

WESTERN AUSTRALIA

BUSINESS FRANCHISE (TOBACCO) AMENDMENT ACT

No. 39 of 1987

AN ACT to amend the *Business Franchise (Tobacco) Act 1975*.

[Assented to 3 July 1987]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title

1. This Act may be cited as the *Business Franchise (Tobacco) Amendment Act 1987*.

Commencement

2. (1) Subject to subsection (2), this Act shall come into operation on the day on which it receives the Royal Assent.

(2) Sections 7, 8, 11 and 13 shall be deemed to have come into operation on 2 December 1986.

Principal Act

3. In this Act the *Business Franchise (Tobacco) Act 1975** is referred to as the principal Act.

[*Act No. 84 of 1975 as amended by Acts Nos. 32 of 1980, 22 and 82 of 1981, 10 of 1982 and 4 of 1983.]

Section 2 amended

4. Section 2 of the principal Act is amended—

- (a) in subsection (1), in the definitions of “tobacco retailing” and “tobacco wholesaling” by deleting “in the course of intrastate trade”;
- (b) by repealing subsections (4) and (5) and substituting the following subsections—

“ (4) For the purposes of this Act, a person—

- (a) sells tobacco;
- (b) carries on tobacco wholesaling; or
- (c) carries on tobacco retailing,

if another person does so as his employee.

(5) Subsection (4) does not affect any liability that may attach to the employee for an offence against section 6 (1) or (2) or 8 (1).

(5a) For the purposes of this Act, a person sells tobacco if he effects a sale as agent of another person.

(5b) Subsection (5a) does not affect the liability of the agent's principal for an offence against section 8 (1).

(5c) For the purposes of this Act, a person—

- (a) sells tobacco;
- (b) carries on tobacco wholesaling; or
- (c) carries on tobacco retailing,

if another person does so as his agent, unless the first-mentioned person proves that the agent acted beyond his authority and that he did not directly nor indirectly ratify, approve of, or benefit from, the acts of the agent.

(5d) For the purposes of this Act—

- (a) a person who, in relation to tobacco wholesaling, acts as an agent of a person who carries on tobacco wholesaling also carries on tobacco wholesaling;

and

- (b) a person who, in relation to tobacco retailing, acts as an agent of a person who carries on tobacco retailing also carries on tobacco retailing.

(5e) The authority of a licence—

- (a) extends to a sale by an agent or employee on behalf of the holder of the licence; and
- (b) in the case of a wholesale tobacco merchant's licence, a retail tobacconist's licence, or a group tobacco licence, extends to an agent who carries on tobacco wholesaling or tobacco retailing as mentioned in subsection (5d). ”; and

- (c) by repealing subsection (10).

Section 4 amended**5. Section 4 of the principal Act is amended—**

- (a) by repealing subsection (1) and substituting the following subsections—

“ (1) Subject to subsection (1a), the Commissioner or any officer or person authorized by him in that behalf may at any reasonable time—

- (a) enter and search any premises on which, or on which he reasonably suspects, there is any relevant material and, in a case where those premises comprise a vehicle, vessel or aircraft, stop and detain and give directions as to the movement of the same;
- (b) break open and search any package or receptacle in the premises;
- (c) secure any relevant material against interference, or seize any relevant material and deliver it to the Commissioner or a person authorized by him to receive it;
- (d) request any person found in or upon the premises to produce any relevant material which at the time of the request is in the possession, under the control, or at the order or disposition, of that person; and
- (e) take copies of, or extracts or notes from, any relevant material referred to in paragraph (d) or of which possession is taken under paragraph (c).

(1a) The Commissioner or any officer or person authorized by him in that behalf shall not under subsection (1) enter any premises, or part of any premises, used for residential purposes unless—

- (a) the consent, express or implied, of the occupier or a person present at the premises has been obtained;
- (b) such entry is authorized by a warrant issued by a Justice of the Peace on complaint made on oath, the Justice being satisfied that there are reasonable grounds for believing that the entry is required for the purposes of subsection (1); or

- (c) in the opinion of the Commissioner or of the officer or person the delay in obtaining a warrant under paragraph (b) could frustrate or impede the purpose of the entry.

(1b) The Commissioner shall furnish to an officer or person authorized by him for the purposes of this section a certificate stating that he is so authorized.

(1c) The Commissioner or a person referred to in subsection (1) (c) may retain possession of any relevant material that comprises accounts, records, books or documents for such period as is necessary to enable them to be inspected and the power in subsection (1) (e) to be exercised.

(1d) The exercise of any power conferred by this section may be accompanied by the use of such force as is necessary in the circumstances.

(1e) In this section “relevant material” means—

(a) any account, record, book or document—

- (i) that will, or is reasonably believed to afford evidence of the commission of an offence against this Act; or
- (ii) that is, or is reasonably suspected to be, relevant to the assessment of a licence fee under section 10 or 12 or a fee under section 12A;

(b) any tobacco that—

- (i) is reasonably suspected to be the subject of an offence or an intended offence against this Act or is in premises that are reasonably suspected to be being used contrary to section 8 (3);
- (ii) is reasonably suspected to be part of the stock of a person who is reasonably suspected to be carrying on tobacco wholesaling contrary to section 6 (1); or

(iii) is in any premises in which there is any tobacco within the description in subparagraph (i) or (ii). ”;

(b) in subsection (2)—

(i) in paragraphs (a), (b) and (d) by inserting after “officer” in each place where it appears the following—

“ or person ”; and

(ii) by deleting paragraph (c) and substituting the following paragraph—

“ (c) fail to comply with a direction or request of the Commissioner or an officer or person under subsection (1) (a) or (d); or ”;

(c) by repealing subsection (3) and substituting the following subsection—

“ (3) A person does not commit an offence against paragraph (a), (b) or (c) of subsection (2) in relation to the exercise or attempted exercise of a power referred to in that paragraph, if he proves to the satisfaction of the court that, at the time of the exercise or attempted exercise of the power, the Commissioner did not identify himself as such, or the officer or person did not produce a certificate issued to him under subsection (1b). ”;

and

(d) by repealing subsection (4) and substituting the following subsection—

“ (4) A person is not excused from producing any account, record, book or document under subsection (1) (d) on the ground that it contains information that might tend to incriminate him or make him liable to a penalty or forfeiture. ”.

Section 4A inserted

6. After section 4 of the principal Act, the following section is inserted—

Disposal of tobacco seized under section 4

“ 4A. (1) Where any tobacco is seized under section 4 (1) (c), the tobacco may, subject to this section, be retained by the Commissioner, or a person authorized by him, and held in such place as the Commissioner may direct.

(2) As soon as practicable after the tobacco is seized, the Commissioner shall give notice in writing of the seizure to every person in the State appearing to him to be a person who claims a financial interest in the tobacco.

(3) A notice under subsection (2) shall set out the effect of this section.

(4) Any person who claims a financial interest in any tobacco referred to in subsection (1) may make a complaint to a justice for an order that the tobacco or any part thereof be released to him.

(5) An application under subsection (4) may be made at any time while the tobacco is in the possession of the Commissioner, or a person authorized by him, and notwithstanding that an order is in force under subsection (6) (a).

(6) A magistrate shall hear and determine the complaint and may order that the tobacco to which the complaint relates, or any part of that tobacco, be either—

- (a) retained by the Commissioner, or a person authorized by him, for the purpose of investigation and disposal under subsection (8) or (9); or
- (b) released to the complainant or a person appearing to be entitled to possession of it,

and may impose any condition to be complied with by a person referred to in paragraph (b) before the tobacco is released to him or while it is in his possession under the order.

(7) A magistrate shall not make an order under subsection (6) (b) unless he is satisfied that the purposes of subsection (9) would not be defeated by the order.

(8) If no person is tried for an offence against section 6 (1), 6 (2) or 8 (1) in relation to tobacco seized under section 4 (1) (c), or if no person is convicted of such an offence, the Commissioner shall, subject to subsection (9) (b), release the tobacco to the person or persons appearing to him to be entitled to possession of it.

(9) If a person is convicted of an offence against section 6 (1), 6 (2) or 8 (1) in relation to any tobacco held under subsection (1) or under an order made under subsection (6) (b), the court shall order that the tobacco—

(a) that is the subject of the offence; or

(b) in the case of an offence against section 6 (1), that comprises the stock of the offender,

is forfeited to the Crown.

(10) Where any tobacco is forfeited to the Crown under this section it shall be dealt with as the Minister may direct. ”.

Section 6 repealed and a section substituted

7. Section 6 of the principal Act is repealed and the following section is substituted—

Licensing of tobacconists

“ 6. (1) A person shall not carry on tobacco wholesaling except under and in accordance with a wholesale tobacco merchant's licence or a group tobacco licence.

Penalty: \$40 000.

(2) A person shall not purchase tobacco in the course of carrying on tobacco retailing—

(a) except under and in accordance with a retail tobacconist's licence or a group tobacco licence; or

(b) unless the purchase is exempt under subsection (3).

Penalty: \$40 000.

(3) A purchase of tobacco by a person is exempt from subsection (2) if—

- (a) the purchase is made from the holder of a licence; or
- (b) the tobacco was previously purchased by another person from the holder of a licence. ”.

Section 8 amended

8. Section 8 of the principal Act is amended by repealing subsections (1), (1a) and (1b) and substituting the following subsections—

“ (1) A person shall not sell tobacco—

- (a) except under and in accordance with a licence; or
- (b) unless the sale is exempt under subsection (1a).

Penalty: \$40 000.

(1a) A sale of tobacco by a person is exempt from subsection (1) if—

- (a) it is made in the course of tobacco retailing and the tobacco—
 - (i) was purchased from the holder of a licence; or
 - (ii) was previously purchased by another person from the holder of a licence; or
- (b) the sale is not made in the course of trade or business.

(1b) In this section, and in subsections (4), (5a) and (5c) of section 2 in their application to this section, “sell” includes, without limiting its primary meaning—

- (a) attempting to sell;
- (b) offering, displaying or exposing for sale;
and
- (c) with a view to sale—
 - (i) supplying;
 - (ii) transporting; or
 - (iii) holding. ”.

Section 8A inserted

9. After section 8 of the principal Act, the following section is inserted—

Liability of Employees

- “ 8A. A person is not guilty of an offence against section 6 (1) or (2) or 8(1) as an employee if he proves to the satisfaction of the court that he acted under an honest and reasonable belief that the tobacco wholesaling, the purchase of tobacco, or the sale of tobacco, as the case may be, took place under, and in accordance with, a licence. ”.

Section 10 amended

10. Section 10 of the principal Act is amended—

- (a) in subsection (1) (k) by inserting after “a fee of” the following—

“ \$20 for each retailer together with ”; and

- (b) by repealing subsection (3a) and substituting the following subsections—

“ (3a) Where an application is made for a licence and tobacco wholesaling or tobacco retailing was not carried on by the applicant during the relevant period or was carried on by him for only part of that period, the fee payable by the applicant in respect of the licence shall be such amount as is assessed by the Commissioner as being just and reasonable in the circumstances of the case having regard to the tobacco that would in the opinion of the Commissioner have been handled by the applicant had he been carrying on the business in respect of which the application for the licence was made during the relevant period, the relevant principles of determining fees under subsection (1) and where the application is made in respect of a licensing period that is less than 2 months, the period that the licence will be in force.

(3b) Subsection (3a) applies for the purpose of ascertaining the fee to be used as a basis for the assessment of a fee under section 12A, as if the person referred to in that section had applied for a licence for a period to which the assessment relates. ”.

Section 12A amended and transitional provision

11. (1) Section 12A of the principal Act is amended in subsection (1) by inserting after "a fee equal to" the following—

“ twice ”.

(2) Section 12A of the principal Act as amended by subsection (1) does not apply in its amended form to any period before the commencement of this section for which a licence was required to be, but was not, held.

Section 12B amended

12. Section 12B of the principal Act is amended by inserting after subsection (3) the following subsection—

“ (4) This section applies to a fee under section 12A in the same way as it applies to licence fees. ”.

Section 12D inserted

13. After section 12C of the principal Act the following section is inserted—

Liability of directors, etc. where offence
committed by corporation

“ 12D. (1) Where an offence is committed against section 6 (1), 6 (2) or 8(1) by a body corporate, every director of the body corporate is jointly and severally liable with the body corporate and every other director for the payment of—

(a) any fine imposed on the body corporate for the offence;
and

(b) a fee that is payable under section 12A.

(2) In subsection (1) “director” includes any other officer concerned in the management of the body corporate.

(3) Nothing in this section affects the operation of section 556 of the *Companies (Western Australia) Code*. ”.

Section 15 amended

14. Section 15 of the principal Act is amended by inserting after subsection (4) the following subsections—

“ (5) A person is not guilty of an offence against subsection (4) by reason of his failure to furnish information if he proves to the

satisfaction of the court that he did not have knowledge of, and could not with reasonable diligence have ascertained or obtained, the information.

(6) A person is not excused from furnishing any information or producing any book, document or other paper if required to do so under subsection (1) on the ground that the information, or any information in the book, document or paper, might tend to incriminate him or make him liable to a penalty or forfeiture; but the information shall not be admissible in proceedings against that person under this Act, other than proceedings for the recovery of any fee under section 10, 12 or 12A or an appeal under section 17. ”.

Section 16 amended

15. Section 16 of the principal Act is amended in subsection (1) by inserting after “any fee by the Commissioner” the following—

“ , including a fee under section 12A, ”.

Section 19 repealed and a section substituted

16. Section 19 of the principal Act is repealed and the following section is substituted—

Proceedings

“ 19. Proceedings for an offence against this Act—

- (a) may, notwithstanding any other written law, be begun by the making of a complaint within 5 years after the offence was committed; and
- (b) may be brought by any person authorized in writing by the Commissioner to do so. ”.

Section 20 amended

17. Section 20 of the principal Act is amended in paragraph (e) by deleting “one hundred dollars” and substituting the following—

“ \$1 000 ”.

Repeal of spent provisions

18. Each provision of the principal Act referred to in the Table to this section is repealed.

TABLE

Paragraphs (a) to (d) of section 9.
Paragraphs (a) to (h) of section 10 (1)
Section 10 (3)
Section 10 (5) to (7)
Section 11

Deletion of certain references

19. The principal Act is amended—

- (a) by deleting “in the course of intrastate trade” in the provisions referred to in Table 1 to this section; and
- (b) by deleting “in the course of intrastate trading” in the provisions referred to in Table 2 to this section.

TABLE 1

Section 2A (2) (a)
Section 2A (4)
Section 10 (1) (k)

TABLE 2

Section 10 (1) (i)
Section 10 (1) (j)

Increase of penalties

20. Each provision of the principal Act referred to in the first column of the Table to this section is amended by deleting the expression set out in the second column opposite the reference to that provision and substituting the expression set out in the third column opposite that reference.

TABLE

<i>Provision</i>	<i>Delete</i>	<i>Substitute</i>
4 (2)	5 000	20 000
5 (2)	One thousand dollars	\$10 000
8 (3)	1 000	5 000
14 (1)	20 000	40 000
15 (4)	10 000	20 000
18 (1)	10 000	20 000
18 (2)	10 000	20 000